No. 4[redacted]90

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JAMES D.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1919.

JOHN GOOCH Jr.,
Petitioner,

vs.

OREGON SHORT LINE
RAILROAD COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE NINTH CIRCUIT

J. H. PETERSON
T. C. COFFIN
Counsel for Petitioner
Residence and Postoffice Address Pocatello, Idaho.

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carrier could stipulate with a passenger for hire that no action for damages for injuries caused by the negligence of the carrier could be instituted unless, within thirty days of the date upon which the injury was received, a notice in writing of claim for damages was filed with the General Manager of the carrier on whose line the injury occurred.

Second:—The Circuit Court of Appeals of the United States for the Ninth Circuit misinterpreted the decisions of this Court in the cases of Georgia, Florida and Alabama Railway Company vs. Blish Milling Company, 241 U. S. 190 and St. Louis Iron Mountain and Southern Railway Company vs. Starbird 243 U. S. 592 in applying the principle of those cases, which were decided under the Act to regulate commerce and which involved injuries to shipments of goods, to the case at bar, which involves injury to a passenger for hire.

Third:—"In the interest of jurisprudence and uniformity of decision" between this Court and the said United States Circuit Court of Appeals of the United States for the Ninth Circuit, there being a substantial conflict of decisions on a vital and controlling matter of law involved in this cause between the said Circuit Court of Appeals of the United States for the Ninth Circuit and this Court in respect to the liability of interstate common carriers to passengers for hire.

In this behalf your petitioner states the following facts:—

Your petitioner brought this action against the respondent in a State Court of competent jurisdic-

tion in the State of Idaho to recover for personal injuries received while traveling as a passenger for hire upon the railroad of the respondent. The cause was removed by the respondent to the United States District Court for the District of Idaho, Eastern Division, where the same was tried before the Honorable Frank S. Dietrich, United States District Judge and a jury.

It was admitted that the respondent was engaged in operating a railroad extending through the States of Wyoming, Idaho, Utah, Montana and Oregon, used for the transportation of both interstate and intrastate commerce.

Your petitioner was traveling upon the line of railroad of the respondent as a care taker with a shipment of livestock from Bancroft, Idaho, to Omaha, Nebraska, having left Bancroft, Idaho, in company with a number of other shipments of livestock with their caretakers, on November 23rd, 1917. Early in the morning of November 24th, 1917, while the train and caboose were lying upon a siding at Donovan, Wyoming, the engine of the freight and stock train was engaged in switching operations. All of the caretakers in the caboose including your petitioner, were asleep when, without warning, the engine ran into and reduced the caboose to splinters and your petitioner received the injuries for which he sought recompense in his action.

After about two hours a train passed and your petitioner was placed on a stretcher and carried in the baggage car to the railroad company's hospital at Kemmerer, Wyoming. He remained in the hospital and under the care of the railroad company's

doctors and hospital attendants for about thirty days and until just before Christmas, 1917, and at that time, although not yet discharged from the hospital, he was permitted to go home to be with his family for Christmas. Upon leaving the hospital he was thoroughly bandaged and the bandages were renewed after his return. After this visit he returned to the hospital and sometime thereafter, and on January 15, 1918, was discharged by the railroad physicians. During the time that he was in the hospital he was attended by none but the physicians employed by the respondent and was cared for by none but the hospital attendants employed by the respondent railroad company.

While still in the hospital and undergoing treatment the claims agent of the railroad company interviewed your petitioner on various occasions and discussed a settlement and made offers. Your petitioner declined to commit himself until he knew the extent of his injuries and had had an opportunity to consult his own physicians.

After his discharge from the hospital of the railroad company, being unable to arrive at a settlement with the respondent, your petitioner instituted this action against the railroad company, and the railroad company set up as a defense a noncompliance by your petitioner with the terms of the following stipulation which was contained in the contract of carriage:

> "In consideration of his carriage without charge other than the sum stipulated herein for the carriage of the livestock mentioned herein, as a caretaker accompany-

ing said livestock, the undersigned hereby agrees

"That the carrier shall not be liable for any accident or injury to him caused by negligence on either the going or return trip or while on or around the railroad tracks or premises, *unless the undersigned, or his heirs, or personal representative shall, within 30 days after the accident or injury, give notice in writing of his claim therefor to the General Manager of the carrier on whose line it occurred, and unless such notice is given, no claim for personal injury . . . shall be valid or enforcible.*"

The italicized portion of the stipulation was not complied with by your petitioner, and no explanation for his failure to comply with the same was given other than that apparent from the circumstances.

The cause was tried before a jury, and, after proof of the foregoing facts by your petitioner, the respondent moved the Court for a non-suit because of the failure of your petitioner to give notice of claim in writing for damages for his injuries to the General Manager of the respondent railroad company within thirty days of his injury. The Court allowed the motion, and cited as the principal authority for so holding the case of St. Louis I. M. & S. R. Co. vs. Starbird, 243 U. S. 592, considering the decision applicable for the reason, as stated by the Court in its opinion:

"No court has passed upon this precise question, when it has arisen under what is

called the Carmack Amendment, which, in my judgment is controlling here."
(Italics are ours)

Judgment of dismissal followed, and your petitioner at once moved for a new trial. The motion was denied and your petitioner sued out a writ of error to the Circuit Court of Appeals for the Ninth Circuit. The judgment of the lower Court was there affirmed, and the ruling of the United States District Court for Idaho, as well as the ruling of the Circuit Court of Appeals, was interpreted and bottomed upon the proposition thus epitomized by the Circuit Court of Appeals in its opinion:

"What was held by the Court below, and what is here contended in support of that decision, is that the clause of the contract in question providing that the carrier should not be liable to the care-taker for any injury growing out of the negligence of the former unless he or his personal representative should within 30 days after injury give notice in writing of his claim therefor to the general manager of the line on whose injury it occurred, *was a condition of recovery and not any exemption from or limitation of liability, which condition it was essential for the plaintiff in error to have complied with before being entitled to bring the suit.*"

(Italics are ours)

The ruling of the United States District Court for Idaho, upon the motion for a non-suit, which was based upon the fact, as stated by the United States

District Judge, that this cause "arose under what is called the Carmack Amendment," was palpably in conflict with the decision of This Honorable Court in the case of Chicago R. I. & P. Co. vs. Maucher, 248 U. S. 359 wherein it was said:

> "But the Carmack Amendment deals only with the shipment of property. Its language is so clear as to leave no ground for the contention that Congress intended to deal with the transportation of persons."

The subsequent ground adopted for sustaining the judgment based upon the non-suit, viz., that the stipulation requiring notice of claim in writing to be filed with the general manager of the carrier on whose line the injury occurs within thirty days, is a "condition of recovery and not any exemption from or limitation of liability," is in direct conflict with the decisions of This Honorable Court in the cases of:

New York Central R. Co. vs. Lockwood, 17 Wall. 357;

Chicago, M. & St. P. R. Co. vs. Solan, 169 U. S. 133; and

Norfolk Southern R. R. Co. vs. Chatman 244 U. S. 276.

Your petitioner is advised that the decision of the United States Circuit Court of Appeals for the Ninth Circuit is final and is erroneous and that the same is not reviewable by writ of error and This Honorable Court should require the case to be certified to it for its review and determination.

Your petitioner in the brief accompanying this petition will more particularly elaborate upon the foregoing questions.

Your petitioner presents herewith a certified copy of the entire record in said cause including the proceedings in the Circuit Court of Appeals for the Ninth Circuit and the opinion of the said Court.

WHEREFORE, your petitioner prays that a writ of *certiorari* be issued under the seal of this Court, directed to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, California, commanding the said Court to certify to and send to this Court, on day to be designated, a full and complete transcript of the record and all proceedings of the said United States Circuit Court of Appeals for the Ninth Circuit had in said cause, to the end that the said cause may be reviewed and determined by This Honorable Court as provided by law, and that the said judgment of the Circuit Court of Appeals of the United States for the Ninth Circuit be reversed by This Honorable Court and for such further relief as may seem proper. And your petitioner will ever pray.

J. H. Peterson

T. C. Coffin

Counsel for Petitioner.
Residence and Postoffice
Address, Pocatello,
Idaho.

STATE OF IDAHO,
County of Bannock, } ss.

J. H. PETERSON AND T. C. COFFIN, being first severally sworn, upon oath depose and say, each for himself and not one for the other:—

That he is one of the counsel for the petitioner John Gooch Jr.; that he has read the above and foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied a certified copy of the transcript of the record which accompanies the petition herein, being the transcript of the record in the case at bar; that the matters in said petition are, in the judgment of this affiant, duly supported in and by said transcript of record and that he knows of the above proceedings had and that the acts in said petition herein stated are true to the best of his knowledge and belief.

J. H. Peterson

T. C. Coffin

SUBSCRIBED AND SWORN TO before me this 10th day of June, 1920.

Edith E. Peterson,
Notary Public in and for the State of Idaho, Residing at Pocatello, Idaho.

My Commission Expires April 2, 1924.

(Seal)

We do hereby certify that we have carefully examined the foregoing petition for a writ of *certiorari* and the allegations thereof are true, as we verily believe, and in our opinions the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

J. H. Peterson

J. C. Coffin

Counsel for Petitioner.
Residence and Post-Office Address, Pocatello, Idaho.

Receipt of copy of within and foregoing petition admitted this 11th day of June, 1920, and two copies of transcript of record.

Geo. H. Smith

H. B. Thompson,

John D. Moran.

Counsel for Respondent.

Chatman cases when applied to every case that may arise. If it is to be upheld in any particular case then it would make no difference that in other cases a compliance therewith would be impossible by an injured passenger. We believe that we are justified in saying that the mere statement that such a stipulation is lawful in all cases, or that it is unlawful in all cases is sufficient to show that it is squarely within the class of attempted exemptions of liability which this Court has held unlawful whenever presented for decision.

It is apparent that the stipulation which is now before the court, if we assume for the sake of argument that such a distinction as the Circuit Court of Appeals endeavored to make, exists, would fall within the class of stipulations termed "exemptions from liability" whenever the passenger was seriously injured, and within the class of stipulations termed "conditions of recovery" whenever the passenger was slightly injured. In other words the more serious the injury, the greater the damage and consequent liability the less liklihood of the passenger's complying with it. To call such a stipulation a "condition of recovery" appears to us to be permitting common carriers to juggle with the plain language of this Court in the Lockwood and subsequent cases. This Court has too clearly established the principle that a common carrier cannot stipulate for any exemption of liability for injuries to passengers occasioned by its negligence to permit of a departure from the rule by juggling the words of the English language.

We do hereby certify that we have carefully examined the foregoing petition for a writ of *certiorari* and the allegations thereof are true, as we verily believe, and in our opinions the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

J. H. Peterson

I. C. Coffin

Counsel for Petitioner.
Residence and Post-Office Address, Pocatello, Idaho.

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John D. Moran.

Counsel for Respondent.

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In the instant case, if John Gooch had died on December 25, 1917, as a result of his injuries, his heirs and personal representatives would have had no cause of action against the Oregon Short Line Railroad Company under the decision of the Circuit Court of Appeals of the Ninth Circuit. This for the reason that his death would have occurred thirty-one days after the accident, and it would have been impossible for his heirs and personal representatives to have complied with what the Circuit Court of Appeals has so beningly apostrophized a "simple condition of recovery". In such a case the stipulation in question would have had the effect of entirely exempting the Railroad Company from liability.

If, in the instant case, John Gooch had been injured in the head, and the possibilities of such an injury were not remote, so as to have suffered a loss of memory or other mental injury rendering him unfit to think of mundane affairs for more than thirty days, the stipulation would again have operated as a complete exemption from liability.

If John Gooch however had been very slightly injured, it is possible that the stipulation in the contract of carriage might have been complied with.

Without further argument upon the proposition it seems to us a most immoral and unjust stipulation when the possibility of compliance therewith diminishes in direct proportion to the seriousness of the injury and the amount of the liability of the carrier.

The case which is now before the Court probably does not present the extreme example of the injustice of such stipulation for it shows that Gooch's injuries were not serious enough to confine him in the hospital for more than fifty days, and that he was granted a temporary vacation from the hospital at the end of about twenty-eight days. The striking features of the case at bar however, are that the injury was occasioned at a time when Gooch was asleep in a caboose where he had a right to be; that the caboose was demolished and literally reduced to splinters by the sole negligence and inexcusable carelessness of the servants of the respondent Railroad Company; that Gooch remained in the hospital of the Railroad Company under the exclusive care of Railroad physicians and Railroad hospital attendants for practically the entire period covered by the stipulation in which he was required to file a written notice of claim with the General Manager of the Railroad; that the Claim Department of the Railroad Company was willing to settle the case and waive any right it might have under the stipulation in question until it found that it could not settle the case in accordance with the ideas of the Claim Department.

We have not, in this brief attempted to analyze the decisions of this Court in the Lockwood, Solan and Chatman cases to which we have frequently referred. We have noted particularly in our reading of those cases that in the Lockwood case (17 Wall 384) this Court has stated that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from liability for

the negligence of itself or its servants, and that these rules apply both to carriers of goods and carriers of passengers for hire and with a special force to the latter. We have also noted that in the Chatman case (244 U. S. 281) this Court stated that the settled rule of policy established by the Lockwood case, and the decisions following it, must be considered unmodified by the Act to Regulate Commerce.

With the history of these cases before us, we have been unable to reach any conclusion in this matter other than that the decision of the Circuit Court of Appeals for the Ninth Circuit has upset entirely the settled rule of policy of the Lockwood case. That decision has had the effect of upholding a stipulation regarding a passenger for hire which would be unlawful under the first Cummins Act as applied to a shipment of goods; it has had the effect of upholding a stipulation in respect to a passenger for hire which would operate as a complete exemption of liability in every case of serious injury or of death occurring more than thirty days after the accident.

For the reasons we have endeavored to make clear, we submit that the Petitioner is entitled to the relief which he here seeks, and that the record in this case should be certified to this Court for examination and review to the end that common carriers in the Ninth Circuit be governed by the same rules

that govern common carriers in the other portions of the United States.

Respectfully submitted,

J. A. Peterson

J. C. Coffin

Counsel for Petitioner.
Residence, Pocatello, Idaho.

To Geo. H. Smith,
H. B. Thompson,
John O. Moran,
Counsel for Respondent.

You, and each of you, will please take notice that the Petitioner will call up his petition for a Writ of Certorari before the Supreme Court of the United States at Washington, D. C. on October 4th, 1920, the opening day of the next term of said Court.

Dated this.....day of September, 1920.

Counsel for Petitioner.
Residence, Pocatello, Idaho.

Service of the foregoing brief by receipt of three copies thereof admitted this.....day of September, 1920, and notice of the calling up of said petition on October 4th, 1920, admitted this said..... day of September, 1920.

Residence, Salt Lake City, Utah.

Residence, Pocatello, Idaho.
Counsel for Respondent.